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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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COURT OF CRIMINAL APPEALS
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IN THE
TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

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No. 08-18-00190-CR
In the Eighth District Court of Appeals
El Paso, Texas

* * * * * * * * * * * * *

TIMOTHY MARK WEST
Appellant,

V.

THE STATE OF TEXAS
Appellee.

* * * * * * * * * * * * *

PETITION FOR DISCRETIONARY REVIEW

* * * * * * * * * * * * *

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would assist to resolve whether the lower court of appeals erred in its majority opinion. The issues considered by the court of appeals and currently before this Court are of significant importance, conflicts with this Court's decisions on the same issue, and would be assisted by oral argument. Thus, Appellant requests that oral argument be granted.

STATEMENT OF THE CASE

Appellant, Timothy Mark West, has been charged three times, through three separate indictments, since September 13, 2016. The initial indictment alleged three counts of Fraudulent Possession of a Controlled Substance, to wit: Tramadol. (CR: 21-23). The actual language of the initial indictment alleged that Appellant did "knowingly possess or attempt to possess a controlled substance, to wit: Tramadol by misrepresentation, fraud, forgery, deception, or subterfuge." (CR: 21-23). Subsequent indictments were filed alleging the substance at issue to be Oxycodone, with the final indictment including a paragraph alleging that the initial indictment tolled the statute of limitations as to the subsequent indictment.

PROCEDURAL HISTORY

The initial indictment alleged that these possessions or attempts at possession occurred *on or about* January 21, April 2, and June 5 of 2015. (CR: 21-23). The case was set for trial on May 4, 2018. (CR: 52). Defense counsel was prepared for trial on May 4, 2018. (RR5: 11). Upon a motion by the State, the trial was then continued until September 7, 2018. (CR: 52). On June 13, 2018, the State submitted a Motion to Dismiss. (RR5: 5). Prior to dismissing their initial indictment, the State filed a new indictment on June 5, 2018, assigned Cause Number 20180D02900. (CR: 168-71). In this subsequent Indictment, the State alleged that Appellant possessed or attempted to possess Oxycodone, not Tramadol. (CR: 168-71). Appellant filed a

Motion to Quash the Indictment on June 13, 2018, and Visiting Judge Alcala granted the Motion to Quash on June 21, 2018, since the State had not pled a tolling paragraph. (RR2:12-15).

The State filed a third indictment on June 26, 2018, assigned Cause Number 20180D03392 ("Third Indictment"). (CR: 8-10, 173-75). In the third indictment, the State again alleged fraudulent possession or attempted possession of Oxycodone on or about January 21, April 2, and June 5 of 2015. (CR: 8-10, 173-75). This time, the State pled a tolling paragraph alleging, in part, that "during a period from the 13th day of September, 2016, until the 13th day of June, 2018, an indictment charging the above offense was pending in a court of competent jurisdiction, to wit: cause number 20160D04320." (CR: 8-10, 173-75). Appellant filed his Motion to Quash on July 9, 2018, and the Motion was heard and considered by this Court on September 20, 2018. (CR: 113-14). On September 27, 2018, Appellant filed a Brief in Support of Appellant's Motion to Quash. (CR: 153-75). On October 15, 2018, the Court signed an Order granting Appellant's Motion to Quash. (CR: 210). Appellant then appealed the judgment of the trial court to the Eight District Court of Appeals. On February 14, 2020, the Eighth District Court of Appeals reversed the judgment of the trial court and remanded the case for further proceedings. No motion for rehearing was filed.

GROUNDS FOR REVIEW

1. In finding that the original indictment that charged three counts of possession or attempted possession of a controlled substance, to wit: tramadol (by misrepresentation, fraud, forgery, deception or subterfuge, on or about three separate dates), alleged the same conduct, act or transaction as a subsequent indictment that charged the possession or attempted possession of oxycodone, the Court of Appeals decision conflicts with decisions of the Court of Criminal Appeals and the United States Supreme Court, Tex. R. App, P. 66.3(a)(c).

ARGUMENT

I. The Court of Appeal's decision finding that original indictment alleged the same conduct, act, or transaction as the third indictment conflicts with the decisions of the Court of Criminal Appeals and the United States Supreme Court; Tex. R. App, P. 66.3(a)(c).

The issue presented is a question of law subject to *de novo* review. *See Martinez v. State*, 527 S.W.3d 310, 322 (Tex. App.—Corpus Christi 2017, pet. ref'd).

Pursuant to Article 12.01(7) of the Texas Code of Criminal Procedure, the statute of limitations for the charged offense is "three years from the date of the commission of the offense." All indictments at issue allege offenses occurring on or about January 21, April 2, and June 5 of 2015. (CR: 21-23, 169-71, 173-75). The third indictment was filed on June 26, 2018, over three years from any of the dates listed in the Indictment. (CR: 173-75). Therefore, unless the statute of limitations has tolled, the third indictment is fundamentally defective. *See* TEX. CODE CRIM. PROC. art. 21.02(6).

Article 12.05(b) of the Texas Code of Criminal Procedure permits tolling of the statute of limitations "during the pendency of an indictment, information, or complaint." In *Hernandez v. State*, the Court of Criminal Appeals held that a prior indictment tolls the statute of limitations when "both indictments allege the same conduct, same act, or same transaction." 127 S.W.3d 768, 771–72 (Tex. Crim. App. 2004). When both indictments allege the "same conduct, same act, or same transaction," effective defense counsel will conduct an investigation that will *necessarily* involve the facts and witnesses central to a defense to the subsequent indictment, whether or not the defense would be the same or foundationally different. In other words, "if the defense counsel has adequate notice of a charge, he can preserve those facts that are essential to his defense." *Id.* at 772. As such, Article 12.05(b)'s primary mandate is that a defendant "have adequate notice so that he may prepare a defense." *Id.* In determining whether such notice has been provided, the proper focus of the inquiry is "the factual basis of an indictment, rather than the specific charge alleged." *Id.* at 773.

In *Hernandez*, the Court noted that "[b]oth indictments charged the appellant with *possession* of a

controlled substance on or about July 19, 1997, and the names methamphetamine and amphetamine refer to the same controlled substance *found on the appellant*." *Id.* at 774 (emphasis added). The facts presented to the *Hernandez* Court involved an actual, identified substance found on the appellant, thereby providing notice. The exact date and time of the offense were known because the appellant was being booked into custody. The appellant was being charged with actual possession, providing notice that the State was not intending to proceed with any argument that the appellant attempted to possess any other drug on that day. In the facts of the *Hernandez* case, there was no room for misunderstanding, defense counsel was provided with the type of clear notice necessary to conduct an independent investigation and to preserve facts and witnesses for a potential trial at a later date.

While adequate notice occurs when both indictments allege the same conduct, same act, or same transaction, adequate notice does not occur when both indictments allege only the same *type* of conduct, same *type* of act, or same *type* of transaction. In *Marks v. State*, 560 S.W.3d 169, 170–71 (Tex. Crim. App. 2018), the Court of Criminal Appeals reexamined its understanding of "same conduct, same act, or same transaction." In its reading of why the *Marks* Court held the statute of limitations in that case had not tolled, the Eighth District Court of Appeals noted that "the Court appeared to reason that the gravamen of the low-offending conduct for each of the charged offenses would not necessarily intertwine with the gravamen of the other during the commission of either charged offenses." *Opinion p. 9.* While noting the critical differences between Mr. West's case and the facts of *Hernandez*, the Court of Appeals largely relied on *Marks* to find that the original indictment alleged "the specific umbrella of conduct" that would reasonably cause him "to contemplate preserving facts that might be essential to his defense." *See id.* The Court of Appeals did not define the "gravamen of the law-offending conduct" nor did it define "umbrella of conduct." The Court of Appeals further stated that *Marks* did not announce a rule that "a prior and subsequent indictment must necessarily require defense counsel to prepare the same defense." *Id.* However, that argument was never made by Appellant. Relying primarily upon *Hernandez* and *Marks*, Appellant argued that the prior and subsequent indictment must contain a sufficiently similar factual basis that the first indictment would necessarily alert a defendant and counsel to the possibility of the

allegations in the subsequent indictment. The defense need not be the same to each indicted offense, but the facts must be similar enough that effect defensive counsel would necessarily preserve the facts and witnesses central to the subsequent defense.

In actuality, the *Marks* Court *did* focus on the necessary similarities and possible differences between the factual allegations in the two indictments. 560 S.W.3d at 171. Regarding the necessary similarities, the Court inquired whether the core action would always remain the same for both sets of pled allegations. *See id.* Under the amended indictments, Appellant "did not even *need to* actually provide security services—the act alleged in the original indictments. And to provide security services under the original indictments, Appellant *need not* have carried a firearm or entered into any agreement to do so." *Id.* (emphasis added). The Court then hypothesized about potential scenarios where a defense to the initial indictment would not preserve facts and witnesses central to possible defenses to the subsequent indictment. *See id.* The *Marks* Court imagined a scenario in which "a defendant *did* have a license to be in the guard company business and was facing one of these original indictments accusing him of not having such a license." *Id.* In such a scenario, the defendant would only prepare a defense focused on the possession of a license. Under these circumstances, the *Marks* Court asked, "[w]hat would make him think that the State was accusing him (or that he needed to defend against) the allegation that he carried or agreed to carry a firearm without having been personally commissioned to do so?" *Id.* Through this hypothetical, the *Marks* court focused on whether the defense counsel's investigation into the allegations of the initial indictment – guided by the defense theory to those allegations – would *necessarily* translate into defenses to the allegations of the subsequent indictment. The Court of Appeals did not engage in the reasoning outlined by the *Marks* Court, but rather announced that the "gravamen of law-offending conduct" and the "umbrella of conduct" were the same. *Opinion p. 9.* Without engaging in the reasoning of the *Marks* Court, the Court of Appeals' decision does not explain the limits of its reasoning – suggesting instead that when the same offense is alleged, the "gravamen" and the "umbrella of conduct" would be the same.

The initial indictment pled the statutory language, contained the possibility of an attempt, used

"on or about" language, and contained only one critical, specific fact – the particular controlled substance. Therefore, only the specifically alleged controlled substance provided notice as to the facts and witnesses central to a defense. A change in pled substances fundamentally altered the initial indictment. The dates "on or about" take on greater significance in the overall context of inadequate notice because no exact dates were known and no exact dates needed to be proven by the State. In fact, in using the "on or about" language in the initial indictment, the State provided notice only of its intent to use some date within a three-year range: prior to the presentment and within the three-year statute of limitations. *See, e.g., Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997) ("It is well settled that the "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period.").

Therefore, as used by the *Marks* Court, a hypothetical could help to clarify and show the dangers of relying upon the charged offense and statutory language alone, which the Court of Appeals seemed to find was all that needed to remain similar between indictments in order to charge the same "gravamen of law-offending conduct" or to be contained with the same "umbrella of conduct". Based on the Court of Appeals' reasoning, a person could be charged in 2016 with the offense of fraudulent possession or attempted possession of a controlled substance, to wit: Oxycodone. Similar to the scenario envisioned in *Marks*, the defendant may never have possessed or attempted to possess Oxycodone and would prepare only for that specific factual defense. That person may be receiving ten different medications from multiple doctors. Factually innocent as to the charge initially alleged, what would make this person think that they could be charged two years later with possession or attempted possession of a different controlled substance? That person would prepare a defense focusing on Oxycodone. That person would not be preparing a defense to a separate alleged controlled substance. According to the Court, that person could be charged in 2018 with possession or attempted possession of a different controlled substance, perhaps one of the past medications, because it would be the same charged offense tracking the statutory language and therefore involving the same "umbrella of conduct." Preparing a defense for this subsequent charge would almost certainly involve different facts, different witnesses, and an overall different

investigation because the new allegations would have a different factual basis and would involve different acts, conduct, or transactions. According to the Court's, so long as this person is charged with the same *type* of act, *type* of conduct, or *type* of transaction, the statute of limitations should be tolled. Based on that reasoning, that person could, again in 2020, be charged with possession or attempted possession of yet another one of the ten medications. The process could continue for decades.

Finally, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). The duty to conduct a thorough, independent investigation of the facts of a case stems from the core role of defense counsel: "to make the adversarial testing process work in the particular case." *Id.* at 690. Without such an investigation, a defendant must endure ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Texas Constitution. This investigatory component of the fundamental right to the effective assistance of counsel has been repeatedly reaffirmed. *See, e.g., Ex parte Bowman*, 533 S.W.3d 337, 350 (Tex. Crim. App. 2017); *Robertson v. State*, 187 S.W.3d 475 (Tex. Crim. App. 2006). A defendant has the right to a thorough and independent investigation into the facts of a case in order to preserve fairness in adversarial proceedings. Defense counsel cannot fulfill that obligatory role without adequate notice of what to investigate. As neither Appellant nor his defense counsel had adequate notice from the initial indictment, defense counsel was deprived of the opportunity to make a reasonable decision about what sort of investigation would be necessary regarding possession or attempted possession of a different substance entirely. Since that investigation was not conducted promptly and essential facts and witnesses were not preserved, Appellant would be deprived of his right to the effective assistance of counsel if the case were to proceed to trial. The Court of Appeals did not explicitly address this separate issue, seemingly finding that it was satisfied by the notice inquiry of *Hernandez* and its progeny.

PRAYER FOR RELIEF

Appellant respectfully requests that this Honorable Court grant his Petition for Discretionary Review, set this case for oral argument, reverse the decision of the Court of Appeals, and grant Appellant a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for the Appellant was sent by e-mail using the EFile system to the District Attorney's Office at DAappeals@epcounty.com and mailed to the Appellant TIMOTHY MARK WEST on this the 16th day of March, 2020.

BY: /S/WILLIAM AHEE
WILLIAM AHEE

CERTIFICATE OF COMPLIANCE

Undersigned counsel herein states that the computer generated word count is 3,327 and as such this document is in compliance with the Texas Rules of Appellate Procedure.

BY: /S/WILLIAM AHEE
WILLIAM AHEE

APPENDIX

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	
	§	No. 08-18-00190-CR
Appellant,	§	
	§	Appeal from the
v.	§	
	§	Criminal District Court No. One
TIMOTHY WEST,	§	
	§	of El Paso County, Texas
Appellee.	§	
	§	(TC# 20180D03392)
	§	

OPINION

In this case, the State of Texas appeals the trial court's order granting a motion to quash the State's third indictment against Appellee Timothy West based on a ruling that the State had filed its indictment outside the statute-of-limitations period. In ruling, the trial court determined that the State's two earlier indictments did not toll the statute of limitations applicable to the subsequent indictment because the earlier indictments had not alleged the "same conduct, same act, or same transaction," as required for tolling purposes, pursuant to the standard established by the Court of Criminal Appeals in *Hernandez v. State*. *See Hernandez v. State*, 127 S.W.3d 768, 774 (Tex. Crim. App. 2004). The issue presented in this appeal is whether an original indictment that charges three counts of possession or attempted possession of a controlled substance, to-wit: tramadol, by misrepresentation, fraud, forgery, deception or subterfuge, on three separate dates,

alleges the same conduct, act, or transaction, as a subsequent indictment that charges the same conduct in the same manner except that the controlled substance identified by the charges is not tramadol but oxycodone. Because we conclude that the prior and subsequent indictments alleged the same conduct and shared the same factual basis, we reverse and remand.

BACKGROUND

On September 13, 2016, the State indicted West for three counts of knowingly possessing or attempting to possess a controlled substance, to-wit: tramadol, by misrepresentation, fraud, forgery, deception, or subterfuge, on or about the dates of January 21, 2015, April 2, 2015, and June 5, 2015, respectively, for each count alleged (the first indictment). Thereafter, the State re-indicted West wherein it changed the controlled substance to oxycodone (the second indictment) and, for this reason, dismissed the first indictment pursuant to a motion to dismiss granted by the trial court on June 13, 2018. But the second indictment was later dismissed pursuant to a motion to quash due to the State's failure to also include a tolling paragraph. Thereafter, the State again re-indicted West on June 26, 2018, for three counts of knowingly possessing or attempting to possess a controlled substance, to-wit: oxycodone, by misrepresentation, fraud, forgery, deception, or subterfuge, on the same dates as alleged in the first indictment, except that as compared to the second indictment, the third indictment included identical tolling paragraphs to each count (the third indictment).

Again, West filed a motion to quash the third indictment. In his motion, West contended that the third indictment was barred by the statute of limitations for the charged offense and that the tolling rules did not apply because the first and third indictments did not allege "the same conduct, act or transaction." After a hearing on the motion—at which both parties argued

competing applications of *Hernandez v. State* to the question of whether the first indictment tolled the limitations period for the third indictment—the trial court granted West's motion to quash. The State then timely filed its notice of appeal.

DISCUSSION

In its sole issue on appeal, the State argues that the trial court erred in granting the motion to quash the third indictment. The State asserts that the limitations period was tolled due to the pendency of the original indictment because both indictments alleged the same conduct, same act, or same transaction such that West was on notice from the original indictment as to the substance of the third indictment. West argues to the contrary, that is, that the limitations period could not have been tolled here because the indictments did not allege the same conduct, act, or transaction, and thereby failed to afford him adequate notice to perform an appropriate investigation that would be necessary to preserve essential facts and witnesses for his defense against the newer indictment.

Standard of Review

Whether an indictment is barred by the statute of limitations is a question of law subject to *de novo* review. *See Martinez v. State*, 527 S.W.3d 310, 322 (Tex. App.—Corpus Christi 2017, pet. ref'd); *Brice v. State*, No. 14-13-00935-CR, 2015 WL 545557, at *1 (Tex. App.—Houston [14th Dist.] Feb. 10, 2015, no pet.) (mem. op., not designated for publication).

Applicable Law

The Statute of Limitations and Tolling

The first indictment charged West with third-degree violations of Texas Health and Safety Code section 481.129. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.129(a)(5)(A), (d)(2) (providing that the offense of knowingly possessing or attempting to possess a controlled substance

by misrepresentation, fraud, forgery, deception, or subterfuge, is a third-degree felony if the controlled substance is listed in Schedule III or IV); TEX. HEALTH & SAFETY CODE ANN. §§ 481.002(3), 481.032(a) (providing that the commissioner of state health services shall establish and modify the Schedules of controlled substances); Schedules of Controlled Substances, 44 TEX. REG. 2514, 2524 (2019) (designating tramadol as a Schedule IV controlled substance). The third indictment charged West with second-degree felony violations of the same statute. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.129(a)(5)(A), (d)(1) (providing that the offense of knowingly possessing or attempting to possess a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge, is a second-degree felony if the controlled substance is listed in Schedule I or II); TEX. HEALTH & SAFETY CODE ANN. §§ 481.002(3), 481.032(a); Schedules of Controlled Substances, 44 TEX. REG. 2514, 2519 (2019) (designating oxycodone as a Schedule II controlled substance). The statute of limitations for both sets of these violations is three years. TEX. CODE CRIM. PROC. ANN. art. 12.01(8).

However, the time during the pendency of an indictment shall not be computed in the period of limitation. TEX. CODE CRIM. PROC. ANN. art. 12.05(b). The term "during the pendency," means the period beginning with the day the indictment is filed in a court of competent jurisdiction and ending with the day such accusation is, by an order of a trial court having jurisdiction thereof, determined to be invalid for any reason. TEX. CODE CRIM. PROC. ANN. art. 12.05(c).

***Hernandez's* "Same Conduct, Same Act, or Same Transaction" Rule**

In *Hernandez v. State*, the Court of Criminal Appeals announced the rule that a prior indictment tolls the statute of limitations under article 12.05(b) of the Code of Criminal Procedure for a subsequent indictment when both indictments allege "the same conduct, same act, or same

transaction." 127 S.W.3d at 774. In *Hernandez*, the Court addressed a situation where the defendant was first indicted for possession of 4 to 400 grams of amphetamine committed on July 19, 1997, and subsequently indicted for possession of 4 to 200 grams of methamphetamine committed on the same day. *Id.* at 769, 774. In considering whether the prior indictment could toll the limitations period for the subsequent indictment, the Court observed that allowing a prior indictment to toll the statute of limitations would not defeat the purposes of a limitations period if a prior indictment gave adequate notice of the substance of a subsequent indictment. *Id.* at 772. The Court reasoned that a defendant can preserve those facts that are essential to his defense if he has adequate notice of a charge. *Id.* Although the Court recited the underlying facts of the offense committed by the defendant in its case, the Court restricted its brief analysis to the face of the indictments in reasoning as follows: "Both charges rest on essentially the same proof: the appellant possessed a controlled substance. Although the proof involved in identifying the drug would be slightly different, every other element would rest on the same proof." *See id.* at 774. Ultimately, *Hernandez* held that the prior and subsequent indictments alleged the same conduct and that article 12.05(b) tolled the limitations period during the pendency of the prior indictment. *Id.* at 774.

The Court of Criminal Appeals revisited its "same conduct, same act, or same transaction" rule in a 5-to-4 opinion, with four Judges dissenting, in *Marks v. State*, 560 S.W.3d 169, 169-70 (Tex. Crim. App. 2018). The *Marks* Court addressed a situation where the defendant was first indicted in three cases occurring on three different dates for acting as a guard company, by providing security services, without a proper business license and where the indictment was subsequently amended to charge the defendant for accepting employment as a security officer to carry a firearm without a security officer commission on the same dates as previously alleged. *Id.*

at 170. In holding that the indictments did not comply with the rule set out in *Hernandez*, the Court appeared to reason that the gravamen of the law-offending conduct for each of the charged offenses would not necessarily intertwine with the gravamen of the other during the commission of either charged offenses—even if the offenses involved some of the same underlying facts—as the Court illustrated as follows:

> Under the amended indictments, Appellant did not even need to actually provide security services–the act alleged in the original indictments. And to provide security services under the original indictments, Appellant need not have carried a firearm or entered into any agreement to do so.
>
> There are some common requirements for obtaining a security services license and a security office commission, but a security officer commission, which allows the carrying of a firearm, involves some extra requirements. Suppose a defendant *did* have a license to be in the guard company business and was facing one of these original indictments accusing him of not having such a license. What would make him think that the State was accusing him of (or that he needed to defend against) the allegation that he carried or agreed to carry a firearm without having been personally commissioned to do so?

See id. at 171 [internal footnotes omitted]. The Court also noted that the initial indictment's lack of any additional, specific facts in its allegations and its use of the "on or about" language made it less clear that the same transaction was being alleged in the amended indictment. *Id.* at 171. Ultimately, the Court held that the initial indictment did not toll the limitations period for the offenses alleged in the subsequently amended indictment. *Id.*

In applying the "same conduct, same act, or same transaction" rule from *Hernandez*, our sister courts have observed that the touchstone of the analysis is notice, that is, whether the original indictment fairly alerted the defendant to the subsequent charges against him and the time period at issue. *See Lenox v. State*, Nos. 05-10-00618-CR, 05-10-00619-CR, 2011 WL 3480973, at *9 (Tex. App.—Dallas Aug. 9, 2011, pet. ref'd) (not designated for publication); *Ex parte Brooks*,

No. 12-06-00378-CR, 2011 WL 165446, at *5 (Tex. App.—Tyler Jan. 19, 2011, pet. ref'd) (mem. op., not designated for publication). And our sister courts have held that fair notice is given if the prior and subsequent indictments share the same factual basis. *See Ahmad v. State*, 295 S.W.3d 731, 741 (Tex. App.—Fort Worth 2009, pet. ref'd) ("Two indictments arise from the same conduct if they arise from the same underlying event or incident."); *Lenox*, 2011 WL 3480973, at *9-10 (equating "same conduct, act, or transaction" to "same factual basis"); *Ex parte Brooks*, 2011 WL 165446, at *6 (holding that the defendant was on notice to preserve any facts or defenses available to her for any thefts she committed against the individual named in the indictment where the two indictments shared a factual basis).

Application

In this instance, the State's argument on appeal boils down to this: "Just as in *Hernandez*, the original and third indictments both rested on essentially the same proof – that [West] possessed or attempted to possess a controlled substance. The only difference was the proof in identifying the type of controlled substance, and this difference did not concern the *Hernandez* Court." West argues that *Hernandez* is distinguishable for multiple reasons: "since the [first indictment] alleged [an] attempt through many possible means, since it mirrored the statutory language and used 'on or about' dates, the particular controlled substance alleged in the [first indictment] is the only thing that provided adequate notice to [West]. A change to the pled controlled substance constitutes a fundamental change to the allegations."

Like West, we observe that the charged offenses within the indictments at issue here differ from those in *Hernandez*, first, because they allege not just possession but attempted possession through misrepresentation, fraud, forgery, deception, or subterfuge, and, second, because they

allege three separate on or about dates for commission of the offenses. *Compare Hernandez*, 127 S.W.3d at 769, 774 (addressing two indictments alleging only a possessory offense on a singular date). These differences could theoretically allow for greater permutations in the combination of facts constituting the particular actions committed by West that the State would then assert would show that he had run afoul of the law. Aside from those concerns, West also argued in the trial court that the increase in the penalty range for the possession or attempted possession of oxycodone as compared to tramadol was a relevant factor in assessing whether the two indictments alleged the same conduct. But we dispatch with that separate concern because the tolling test is based on the factual bases of the allegations, rather than any increase in the penalty range, and an increase in the penalty range through a subsequent indictment is not the type of amendment that impermissibly broadens or substantially amends the original indictment. *See Lenox*, 2011 WL 3480973, at *9-10; *Ex parte Brooks*, 2011 WL 165446, at *5-6.

Ultimately, we are unable to agree with West that these differences effectively preclude the first indictment here from giving sufficient notice to alert him to the subsequent charges in the third indictment. This case is too closely analogous to *Hernandez* for us to hold anything other than that the first and third indictments in this case alleged the same conduct. Even if West theoretically could have become liable under the third indictment for three entirely new and discrete actions previously ignored by the State, the first indictment still gave West sufficient notice that "fairly alerted" him that he could be held accountable for a specific umbrella of conduct in order for him to contemplate preserving facts that might be essential to his defense. *See Lenox*, 2011 WL 3480973, at *9; *Hernandez*, 127 S.W.3d at 772 (cases observing that the touchstone of notice considers whether the original indictment fairly alerted the defendant to the subsequent

charges against him and the time period at issue); *see also Ex parte Brooks*, 2011 WL 165446, at *4 ("[T]he difference between these indictments is that the first indictment charged Appellant with one of any of the thefts that she may have committed from the named individual (with the upward bound of $100,000), and the second indictment charged her with every theft she committed from that person pursuant to a scheme or continuing course of conduct. Accordingly, Appellant was on notice that she could be held accountable for conduct, specifically any thefts she committed . . . .").

Essentially, we believe that along the spectrum of cases between *Hernandez* and *Marks*, our situation here more closely resembles that of *Hernandez*. Relying heavily on *Marks*, West argues that the focus is on "whether the defense counsel's investigation into the allegations of the initial indictment – guided by the defense theory to those allegations – would *necessarily* translate into defenses to the allegations of the subsequent indictment." However, in proposing that *Marks* announced a rule requiring that a prior and subsequent indictment must necessarily require defense counsel to prepare the same defense, is a reading of *Marks* that stretches too far. We perceive that the reasoning behind the result in *Marks* may appear to be problematic in application to other cases, as evidenced by the four dissenting Judges in that case. But we think the illustration used by the Court in *Marks* to explain its rationale confined the application of its case to those cases in which the gravamen of law-offending conduct for the charges within a prior and subsequent indictment could never intertwine. In *Marks*, the gravamen of law-offending conduct for the charges under the first indictment amounted to an allegation of providing unlicensed security services, whereas the gravamen under the second indictment amounted to an allegation of carrying a firearm without the proper commission. *See Marks*, 560 S.W.3d at 171. Here, in contrast, the gravamen of law-

offending conduct for the charges in the first and third indictments are the same: possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. We thus find *Marks* distinguishable from the present case.

Therefore, we hold that the first and third indictments here alleged the same conduct because the allegations shared the same factual basis and thereby "fairly alerted" West to the need to preserve any essential defensive facts where: (1) the prior indictment alleged three counts of knowingly possessing or attempting to possess a controlled substance, to-wit: tramadol, by misrepresentation, fraud, forgery, deception, or subterfuge, on or about the dates of January 21, 2015, April 2, 2015, and June 5, 2015, for each count, respectively; and (2) the subsequent indictment charged the same conduct but merely changed the controlled substance from tramadol to oxycodone. *See Hernandez*, 127 S.W.3d at 769, 774; *see also, e.g.*, *Ex parte Brooks*, 2011 WL 165446, at *1, 3-4, 6 (holding that the two indictments at issue covered the same conduct, act, or transaction and thereby shared a factual basis that put the defendant on sufficient notice to preserve any facts or defenses available to her where the first indictment alleged a theft in the amount of more than $20,000, but less than $100,000, between July 1, 1998, and April 1, 2000, from a single individual and where the second indictment alleged a theft, or thefts committed as part of a continuing course of conduct, with an aggregate amount of between $20,000, and $100,000, from the same individual and within a timeframe two months narrower); *Ahmad*, 295 S.W.3d at 742 (holding that the first indictment alleging that the defendant buried a training bomb on January 26, 2002, arose from the same conduct as the second indictment alleging that the defendant made a false report about a bomb and possessed a hoax bomb on the same date because "the offenses all arose from the same conduct: Appellant's possession of and report about some kind of bomb–

hoax, training, or unspecified–on January 26, 2002."); *compare Ex parte Martin*, 159 S.W.3d 262, 265 (Tex. App.—Beaumont 2005, pet. ref'd) (holding that "the factual basis is clearly not the same for the two indictments" and thereby did not toll the limitations period where the first indictment charged the defendant with aggravated robbery committed sometime before September 30, 1998, and where the second indictment charged the defendant with bail jumping committed on May 22, 2001, based upon the defendant's failure to appear for his trial on May 21, 2001, for the aggravated robbery charge).

Based on our holding that the first and third indictments alleged the same conduct as established by the reasoning of *Hernandez*, we conclude that the statute of limitations was tolled during the pendency of the first indictment from the date of its filing on September 13, 2016, to the date of its dismissal on June 13, 2018. *See* TEX. CODE CRIM. PROC. ANN. art. 12.05(b), (c); *Hernandez*, 127 S.W.3d at 774. Excluding this period during which the statute of limitations was tolled, we determine that approximately one year and ten months had expired from the time of count 1's alleged date of January 21, 2015, to the date the State filed its third indictment on June 26, 2018, that approximately one year and seven months had expired from the time of count 2's alleged date of April 2, 2015 to the date the State filed the third indictment, and that approximately one year and five months had expired from the time of count 3's alleged date of June 5, 2015, to the date the State filed the third indictment. Thus, we conclude that all three counts of the third indictment fell well within the three-year statute of limitations for the charged offenses. *See* TEX. CODE CRIM. PROC. ANN. art. 12.01(8); *see also* TEX. HEALTH & SAFETY CODE ANN. §§ 481.129(a)(5)(A), (d)(1), 481.002(3), 481.032(a); 44 TEX. REG. 2519 (2019).

Because the third indictment was timely filed based on the first indictment's tolling of the

limitations period, we conclude that the trial court erred in granting West's motion to quash the third indictment on the basis that the statute of limitations had expired. We therefore sustain the State's sole issue presented for review.

CONCLUSION

Having sustained the State's sole issue, we reverse the judgment of the trial court, set aside the trial court's order granting the motion to quash, and remand the case for further proceedings.

GINA M. PALAFOX, Justice

February 14, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.

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